

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
July 24, 2001 Session

**STATE OF TENNESSEE v. ROBERT B. RIGGS**

**Direct Appeal from the Criminal Court for Sevier County**  
**No. 7058     Richard R. Vance, Judge**

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**No. E2000-01983-CCA-R3-CD**  
**June 25, 2002**

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A Sevier County jury found the Defendant guilty of three counts of misapplication of contract funds. The trial court sentenced the Defendant to two years for each conviction, ordered the Defendant to serve the sentences consecutively, and ordered the Defendant to pay a fine of \$3,000.00 for each conviction. The trial court also ordered restitution in the amounts of \$68,654.00 to Robert Taylor, \$64,689.42 to Carroll D. Patterson, and \$45,000.00 to Jerry Grimes. The Defendant now appeals, raising the following issues: (1) whether Tennessee Code Annotated §§ 66-11-138, -140, the statutes dealing with the misapplication of contract funds, is unconstitutional, (2) whether the trial court committed plain error in instructing the jury on the “intent to defraud” element of the offense, (3) whether the evidence was sufficient to support the convictions for misapplication of contract funds, (4) whether the trial court erred by imposing the maximum term for each conviction and by ordering that the sentences run consecutively, and (5) whether the trial court ordered an excessive amount of restitution. Finding no error, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, and THOMAS T. WOODALL, JJ., joined.

Susanne Bales, Assistant Public Defender (on appeal), Dandridge, Tennessee; and James W. Greenlee (at trial), Sevierville, Tennessee, for the Appellant, Robert B. Riggs.

Paul G. Summers, Attorney General and Reporter; Patricia C. Kussmann, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General; and Steven R. Hawkins, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

A Sevier County jury found the Defendant, Robert Riggs, guilty of three counts of misapplication of contract funds. The trial court sentenced the Defendant to two years for each

conviction and ordered that the sentences be served consecutively. The trial court also ordered restitution in the amounts of \$68,654.00 to be paid to Bob Taylor, \$64,689.42 to be paid to Carroll Patterson, and \$45,000.00 to be paid to Jerry Grimes. The Defendant now appeals, raising the following issues: (1) whether Tennessee Code Annotated §§ 66-11-138, -140, the misapplication of contract funds statutes, is unconstitutional, (2) whether the trial court committed plain error in instructing the jury on the “intent to defraud” element of the offense, (3) whether the evidence was sufficient to support the convictions for misapplication of contract funds, (4) whether the trial court erred by imposing the maximum term for each conviction and ordering that the sentences run consecutively, and (5) whether the trial court ordered an excessive amount of restitution.

## I. FACTS

### A. Grimes Residence

On February 7, 1996, Jerry Grimes, a retired hospital administrator living in Louisiana, and his wife contracted with the Defendant to build a house in Sevier County for \$85,699.00. Grimes made a payment of \$3,500.00 to the Defendant on the day that the contract was signed. The contract called for the house to be completed in July 1996. On February 25, 1996, a change order was made in the contract which called for Grimes to pay for the Defendant to clear the lot on which the house was to be built. When the Defendant told Grimes that the house was ready for the sub-floor, Grimes paid him \$18,000. Grimes testified that after he paid the Defendant for the sub-floor, he tried on “numerous” occasions to contact the Defendant, but he was unable to reach him. Grimes stated that the Defendant’s wife eventually contacted him and said that the Defendant had been sick with the flu for four months.

Grimes visited the site in July 1996 expecting to find a completed house; however, instead he found only “a few sticks and one sub-floor.” On July 28, 1996, the Defendant requested a draw for the roof. At that time Grimes pointed out that only one of the three sub-floors had been completed. Grimes testified that the Defendant told him that the sub-floors would be finished soon, so Grimes paid the Defendant another \$18,000.00 for the roof. Grimes then visited the site in August, and the roof was not completed. After explaining that the roof draw did not include roof coverage, the Defendant requested an additional \$13,000.00 as the “deck-draw” which Grimes paid. On September 5, 1996, Grimes paid the Defendant \$18,000.00 for the electricity to be “roughed-in.”

Grimes testified that in February he paid the Defendant a total of \$4,479.00 in overages, including \$1,631.00 for hickory cabinets that were to be placed in the home. Grimes stated that he never received the cabinets. Grimes testified that he paid the Defendant a total of \$75,000.00. Grimes stated that to his knowledge, the Defendant did not work on the house after February 1997. According to Grimes, after the Defendant was fired, the cost to complete the home was a little over \$40,000.00. This amount included an estimated \$16,000.00 to correct water damage and plumbing problems, which Grimes believed were both caused by the Defendant.

Scott Street, owner of Sevier County Glass and Mirror, testified that his business installed “fixed insulated glass” in the Grimes home between November 1996 and February 1997. Street stated that he billed the Defendant on February 11, 1997 for \$2,600.00. When he did not receive payment, Street sent a second notice thirty days later. Street then sent a final notice stating that the account was in jeopardy. Street testified that after sending the notices, he went to one of the houses that the Defendant was working on and asked him about the money. According to Street, the Defendant said that he had been “trying to balance [his] checkbook and [he would] pay [Street] when [he] got ready to pay [him].” Street testified that he had been paid for other jobs he had done for the Defendant.

#### B. Patterson Residence

Carroll Patterson, a retiree from Ford Motor Company in Michigan, testified that he signed a contract with the Defendant on April 18, 1996, whereby the Defendant would build Patterson’s house for \$110,743.00. Patterson stated that the Defendant told him that the house should be finished in four months. Patterson received a loan from Sevier County Bank, and the Defendant was authorized to take draws from the bank for work on the house. According to Patterson, the Defendant made the following draws: (1) \$10,000.00 on May 3, 1996; (2) \$23,000.00 on August 28, 1996; (3) \$23,000.00 on September 9, 1996; (4) \$23,000.00 on September 23, 1996; and (5) \$13,000.00 on October 18, 1996. The total for the draws was \$92,000.00.

Patterson recalled that he and his wife visited the site on June 24, 1996, and “nothing was done and the ground hadn’t even had a scratch in it at that point.” The Pattersons were unable to locate the Defendant during their first week in town. The next week when they located the Defendant, he explained that there had been quite a bit of rain and other problems that had prevented him from working on the house. The Pattersons visited the house again in August or September 1996, and “the house was framed out; the block was laid and the house was up, it was a shell but it was there.” Patterson testified that he notified the Defendant that he would like to visit the site again in October. According to Patterson, the Defendant told him that the house would be almost complete by October 7, 1996; however, when Patterson arrived sometime after October 14, 1996, there was only “still the shell” of a house. When Patterson left in early November, the Defendant requested, and Patterson paid, another \$2,000.00 for overages.

In December 1996, Patterson sent the Defendant an additional \$4,000.00, and the Defendant guaranteed that the house would be completed by December 28, 1996. In January 1997, when the house was still not completed, Patterson contacted Larry Whaley, from whom he had bought the property, and asked him to check on the Defendant’s progress. Patterson testified that Whaley stated that no work was being done on the house. Patterson testified that no work was done on the house between October 18, 1996, and March 29, 1997, when the Defendant poured the concrete in the basement. Patterson fired the Defendant on May 8, 1997. Patterson stated that at that time, he still

owed \$19,478.00<sup>1</sup> on the contract. Patterson testified that he wrote checks totaling \$7,040.00 for overages, which apparently included a payment of \$1,040.00 made on February 24, 1997. The grand total paid to the Defendant was thus \$99,040.00. According to Patterson, it cost an additional \$64,000.00 to finish his house.

Coy Henry, Jr., owner of an excavation business, was hired by the Defendant in 1997 to do some excavation work on various properties contracted by the Defendant. According to Henry, he performed \$52.50 worth of work on the Patterson home for which he was never paid. Henry testified that he was paid for some prior work he had done on the property. Kim Ball, credit manager at Blalock Lumber Company, testified that the Defendant owed them \$1,567.50 for materials used on the Patterson property. The parties stipulated to an exhibit showing that the Defendant owed \$6,950.00 to Fountain Bay Construction, Inc., for work done on the Patterson home.

Len Johnson testified that he is an architect with R. Len Johnson and Associates. Johnson stated that he inspected the Patterson home and determined that approximately \$65,520.00 was the value of the partially completed house and another \$51,763.00 would have to be expended to complete the home.

### C. Taylor Residence

Robert “Bob” Taylor, a retired insurance investigator from Florida, testified that he purchased property in Sevier County and signed a contract with the Defendant on November 11, 1996, in which the Defendant agreed to build Taylor’s home for \$107,000. Taylor testified that the Defendant had approached him in a restaurant about building the house. Taylor recalled that two change orders were made on the contract for an estimated additional amount of \$16,000.00, which brought the total contract price to \$122,955.00. Taylor testified that the Defendant told him that the house would be finished by June 1997.

Taylor testified that he gave the Defendant \$3,500.00 at the time the contract was signed and then gave him \$25,000.00 on December 19, 1996, when the sub-floor was finished. According to Taylor, the Defendant made a draw of \$32,500.00 on January 21, 1997, for the sub-floor and a portion of the change orders. The Defendant made another draw of \$25,000.00 on January 31, 1997, at which time the Defendant’s son told Taylor that the roof and windows were in. Taylor visited the site on February 1, 1997, but the roof had not been completed.

Taylor maintained that the work on the house was not performed in accordance with the contract. Taylor testified that he had several confrontations with the Defendant and the Defendant’s son regarding the house. Taylor stated “when I got upset [the Defendant] became very belligerent with me for arguing with his son and told me that it would be done when it got done his way and that he wouldn’t be pushed or shoved and that he was not going to be told how to do his job and so forth

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<sup>1</sup>Our review indicates that this amount was actually \$18,743.00.

and so on.” Nevertheless, Taylor testified that he paid the Defendant \$6,154.00 on March 26, 1997, which was the balance for the add-ons. Finally, Taylor stated that he paid the Defendant \$12,000.00 on April 9, 1997, which brought the total to \$104,154.00 paid to the Defendant.

Taylor testified that he noticed in April 1997 that the air conditioner that had been installed in the home had disappeared. Taylor stated that Tim Poole told him that Mike Timmons had repossessed the air conditioner because he had not been paid. Taylor sought a warrant for the Defendant’s arrest and ordered everyone off of the property. Taylor testified that he gave the Defendant a total of \$104,154.00 to build the home, but he had to spend an additional \$110,000.00 to finish the home after the Defendant was fired. A video tape made by Taylor of the property as it looked on May 8, 1997, was introduced into evidence. Taylor believed that only \$30,000.00 was invested in the house by the Defendant. Kirk Whaley, a contractor, testified that in his opinion the value of the partially completed house was \$35,500.00.

Coy Henry testified that he performed \$70.00 worth of excavation work on the Taylor home for which he was never paid. Henry testified that he was paid for some prior work he had done on the property. Timothy Poole testified that he worked for the Defendant on various jobs for approximately a year. According to Poole, the Defendant owed him approximately \$3,000.00 for siding that he put on the Taylor home. Poole testified that he confronted the Defendant about payment, and the Defendant said “he wasn’t going to pay.” Poole also did work on the Patterson home and the Grimes home, but he testified that he was paid for that work.

Kathy Smith, account manager for Carl Ownby and Company, testified that the Defendant owed Ownby \$11,397.00 for hardware and building supplies used on the Taylor property. Kim Ball, credit manager at Blalock Lumber Company, testified that the Defendant owed them \$1,690.42 for materials purchased for the Taylor property.

#### D. Defense Proof

The Defendant, Robert Riggs, testified that prior to moving to Tennessee, he worked as a contractor in Dover, Delaware, from 1984 to 1995, and that he had been building houses for twenty-five or twenty-eight years. The Defendant then moved to Tennessee in 1995 and began building houses in Sevier County. While in Tennessee, the Defendant was arrested on various charges arising from his failure to pay his subcontractors in Delaware. The Defendant pled guilty in Delaware to two counts of misappropriation of funds and two counts of theft over \$500.00. The trial court in Delaware ordered the Defendant to pay approximately \$168,000.00 in restitution. The Defendant also served six months in prison. He testified that the problems in Delaware arose out of “monies that was owed to [his subcontractors].” In 1996, the Defendant contracted separately with Jerry Grimes, Carroll Patterson and Bob Taylor to build their residences in Sevier County, Tennessee. The Defendant was arrested in 1997 for misappropriating funds on each of those homes.

The Defendant testified that he did not complete any of the houses that are the subject of this case; however, he testified that he did not finish the houses because he was fired by each victim. The

Defendant maintained that he had no intent to defraud anyone. The Defendant stated that when he realized that he was in trouble in Tennessee, he sought help from a friend of his in Delaware. According to the Defendant, backers in Delaware were going to loan him money to finish the houses involved in this case. The Defendant also testified that he sold some personal property to obtain money to finish the houses.

The Defendant's son, Timothy Riggs, testified that he assisted the Defendant in his business. According to Timothy Riggs, it was difficult for them to find subcontractors. When questioned about what happened to the money that was paid to them by Grimes, Patterson and Taylor, Riggs responded that "[i]t went to pay overhead and company bills."

Raymond Wolfe, the Defendant's accountant, testified that he had worked for the Defendant for sixteen years. Wolfe testified that the Defendant had been trying to get a loan from someone in Delaware. Wolfe also testified that the Defendant did not owe as much as the court in Delaware ordered him to pay. According to Wolfe, many of the figures were inflated. The Defendant's wife, Carol Jean Riggs, testified that the Defendant operated his contracting business out of their home.

## II. ANALYSIS

### A. Constitutionality of Statute and Jury Instruction

The Defendant first argues that the statute under which he was convicted for misapplication of contract payments unconstitutionally shifts the burden of proof to the defendant. Riggs did not raise the issue of constitutionality of the statute at either the trial or in his motion for a new trial. Generally, the appellate courts will not consider issues that are not properly preserved at the trial court level. See Tenn. R. App. P. 3(e), 36(a); State v. Adkisson, 899 S.W.2d 626, 636 (Tenn. Crim. App. 1994). However, the Defendant contends that this issue should be analyzed because it constitutes plain error. Pursuant to Tennessee Rule of Criminal Procedure 52(b), "[a]n error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice." In State v. Adkisson, this Court set forth the following prerequisites for finding "plain error":

- (a) the record must clearly establish what occurred in the trial court;
- (b) a clear and unequivocal rule of law must have been breached;
- (c) a substantial right of the accused must have been adversely affected;
- (d) the accused did not waive the issue for tactical reasons; and
- (e) consideration of the error is "necessary to do substantial justice."

899 S.W.2d at 641-42 (footnotes omitted). Our supreme court formally adopted this test in State v. Smith, 24 S.W.3d 274, 282-83 (Tenn. 2000), emphasizing that all five factors must be established before plain error will be recognized.

Even under a plain error analysis, the Defendant's argument fails because we conclude from our review that no clear and unequivocal rule of law has been breached. The statute under which the Defendant was convicted provides as follows:

Any contractor, subcontractor, or other person who, with intent to defraud, uses the proceeds of any payment made to that person on account of improving certain real property for any other purpose than to pay for labor performed on, or materials furnished by that person's order for, this specific improvement, while any amount for which such person may be or become liable for such labor or materials remains unpaid, commits a Class E felony.

Tenn. Code Ann. § 66-11-138. Additionally,

[s]uch use of the proceeds mentioned in §§ 66-11-137 -- 66-11-139 for any purpose other than the payment of such unpaid amount shall be prima facie evidence of intent to defraud.

Id. § 66-11-140. The Defendant in this case asserts that this last provision unconstitutionally shifts the burden of proof to the defendant by requiring the defendant to prove that he or she did not intend to defraud. However, this Court has recently held that the statute at issue in this case does not create an unconstitutional mandatory inference, but rather that it "creates a permissive inference which does not unconstitutionally shift the burden of proof to the [d]efendant." State v. Larry Eldon Shannon, No. M2000-00985-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 567, at \*21-22 (Tenn. Crim. App., Nashville, July 27, 2001). The Supreme Court has recognized that although evidentiary inferences and presumptions "are a staple of our adversary system of factfinding," these evidentiary devices "must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." County Court of Ulster County v. Allen, 442 U.S. 140, 156 (1979). The Court explained,

The most common evidentiary device is the entirely permissive inference or presumption, which allows -- but does not require -- the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. In that situation the basic fact may constitute prima facie evidence of the elemental fact. When reviewing this type of device, the Court has required the party challenging it to demonstrate its invalidity as applied to him. Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

A mandatory presumption is a far more troublesome evidentiary device. For it may affect not only the strength of the "no reasonable doubt" burden but also the placement of that burden; it tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with

some evidence to rebut the presumed connection between the two facts. In this situation, the Court has generally examined the presumption on its face to determine the extent to which the basic and elemental facts coincide. To the extent that the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts and based on the presumption's accuracy in the run of cases.

Id. at 157-59 (citations omitted) (first and third emphases added). In determining the type of inference or presumption involved in a case, the jury instructions will generally be controlling. Id. at 157 n.16.

Our supreme court has emphasized that  
[w]hen a jury is instructed concerning a permissive inference, the instructions should make clear that the jury may, but need not, draw the inference suggested by the statute, regardless of whether there is any evidence in the record to rebut the connection between the proved and the presumed facts.

State v. Bryant, 585 S.W.2d 586, 589-90 (Tenn. 1979). Our appellate courts have consistently refused to hold that statutes which set forth evidentiary presumptions or inferences are unconstitutional per se; rather, the courts have looked to the jury instructions to determine whether the jury was instructed on a permissive or mandatory presumption or inference. See; Lowe v. State, 805 S.W.2d 368, 372 (Tenn. 1991); State v. Bolin, 678 S.W.2d 40, 41-43 (Tenn. 1984); State v. Merriweather, 625 S.W.2d 256, 257-58 (Tenn. 1981); Bryant, 585 S.W.2d at 589-90; State v. Bonam, 7 S.W.3d 87, 89-90 (Tenn. Crim. App. 1999); State v. Woodson, 705 S.W.2d 677, 679-80 (Tenn. Crim. App. 1985). According to our supreme court, “in order to pass constitutional muster, . . . an instruction given to the jury pursuant to the statute would have to be phrased in terms of a permissive inference.” Lowe, 805 S.W.2d at 372.

The jury in this case was instructed as follows regarding the presumption:

Any person who commits the offense of misapplication of contract payments is guilty of a crime.

For you to find the [D]efendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that payment was made to the [D]efendant to improve certain real property by:

In Count I, Robert Taylor,  
In Count II, by Carroll D. Patterson; and  
In Count III, by Jerry Grimes.  
and

(2) that the [D]efendant used the proceeds of this payment for a purpose other than to pay for labor or materials to improve the property; and

(3) that some amount for the labor or materials remained unpaid, and the [D]efendant was or could have been liable for that payment; and

(4) that the [D]efendant acted with the intent to defraud.



The trial court also stated that “[i]ntent to defraud’ may be inferred by use of the proceeds for any other purpose than the payment of such unpaid amount.” In addition to the instruction on misapplication of contract funds, the trial court instructed the jury on the State’s burden of proof:

The law presumes the defendant is innocent of the charges against him, and the defendant is not required to prove his innocence. On the contrary the burden of proof is always on the State. The State must prove every element of the offense to your satisfaction beyond a reasonable doubt.

From these instructions, it is clear that the jury was instructed regarding a permissive, rather than a mandatory, presumption. Because the jury was not required to find the elemental fact upon proof of the basic fact, the presumption was not a mandatory presumption which unconstitutionally shifted the burden of proof to the defendant. Accordingly, the use of the presumption did not violate a clear and unequivocal rule of law, and it therefore does not constitute plain error.

### B. Sufficiency of the Evidence

The Defendant challenges the sufficiency of the evidence presented to convict him of misappropriation of contract funds. When an accused challenges the sufficiency of the evidence, an appellate court’s standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 324 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. State v. Buggs, 995 S.W.2d 102, 105 (Tenn. 1999); Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas, 286 S.W.2d at 859. This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. Id.

The Defendant was convicted of misapplication of contract funds. According to the statute governing this crime, it is a felony for a contractor to, “with intent to defraud, use[] the proceeds of any payment made to that person on account of improving certain real property for any other purpose than to pay for labor performed on, or materials furnished by that person’s order for, this specific improvement, while any amount for which such person may be or become liable for such labor or materials remains unpaid.” Tenn. Code Ann. § 66-11-138. Additionally, the use of any contract

funds paid to a contractor for improvement to certain real property “for any purpose other than the payment of such unpaid amount shall be prima facie evidence of intent to defraud.” Id. § 66-11-140. Our supreme court has maintained that the statute “is intended to make the payments to the contractor trust funds for the payment of labor and materials, and to afford protection against contractors who receive money for construction or repair of buildings and divert it to other uses prior to payment of claims for labor, materials, or other charges in connection with the work on the buildings.” Daugherty v. State, 393 S.W.2d 739, 741 (Tenn. 1965).

The Defendant argues that the portion of the statute that states “while any amount for which such person may be or become liable for such labor or materials remains unpaid” contemplates money owed on a project which, if not paid, would result in a lien on the real property. See Tenn. Code Ann. § 66-11-138. The Defendant maintains that the lien requirement is an essential element of the offense and that there was no proof that the Defendant’s conduct resulted in a lien. We do not agree with the defense that the existence of a lien is an essential element of the offense. As the State points out in its brief, the language in the misappropriation statute does not require the existence of a lien or liens against the owner’s property. Rather, it is applicable to any amount for which the contractor, subcontractor, or other person “may be or become liable.” See id. The statute merely contemplates that the owner of the property may become liable to the subcontractors. The lack of evidence of a lien does not eliminate the defendant’s culpability. In addition, the authority cited by the Defendant pre-dates the enactment of Tennessee Code Annotated § 66-11-146, which prohibits mechanics’ and materialmen’s liens against residential property. The Defendant is essentially asking this Court to modify the current statute to require an element that is simply not there. We respectfully decline to do so.

The proof at trial established that the Defendant entered into three separate contracts with Grimes, Patterson, and Taylor to build homes for them, and he received payments from them. According to the Defendant, he was not able to pay all of the suppliers because the money went to pay “overhead” for the business. Quite simply, the Defendant did not complete what he was paid to do and used the monies that he drew, at least in part, for other purposes. As a result, Grimes, Patterson, and Taylor had to pay additional amounts to have their homes finished. The evidence was sufficient to support the jury’s verdict that the Defendant was guilty of misappropriation of contract funds.

### C. Sentencing

The Defendant argues that the trial court erred in sentencing him to the maximum term for each of his convictions and in ordering all three sentences to be served consecutively. When a criminal defendant challenges the length, range, or manner of service of a sentence, the reviewing court must conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption, however, “is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166,

169 (Tenn. 1991). In the event that the record fails to show such consideration, the review of the sentence is purely de novo. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b), -103(5); State v. Williams, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).

The presumptive sentence to be imposed by the trial court for a Class B, C, D or E felony is the minimum within the applicable range unless there are enhancement or mitigating factors present. Tenn. Code Ann. § 40-35-210(c). If there are enhancement or mitigating factors, the court must start at the presumptive sentence, enhance the sentence as appropriate for the enhancement factors, and then reduce the sentence in the range as appropriate for the mitigating factors. Id. § 40-35-210(e). The weight to be given each factor is left to the discretion of the trial judge. Shelton, 854 S.W.2d at 123. However, the sentence must be adequately supported by the record and comply with the purposes and principles of the 1989 Sentencing Reform Act. State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986).

When imposing a sentence, the trial court must make specific findings of fact on the record supporting the sentence. Tenn. Code Ann. § 40-35-209(c). The record should also include any enhancement or mitigating factors applied by the trial court. Id. § 40-35-210(f). Thus, if the trial court wishes to enhance a sentence, the court must state its reasons on the record. The purpose of recording the court's reasoning is to guarantee the preparation of a proper record for appellate review. State v. Ervin, 939 S.W.2d 581, 584 (Tenn. Crim. App. 1996). Because the record in this case indicates that the trial court adequately considered the enhancement and mitigating factors as well as the underlying facts, our review is de novo with a presumption of correctness.

If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence "even if we would have preferred a different result." State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). The defendant bears the burden of showing the impropriety of the sentence imposed. Ashby, 823 S.W.2d at 169.

Regarding the length of the sentences, because the Defendant was convicted of three Class E felonies, the range of punishment is one to two years for each conviction. See Tenn. Code Ann. § 40-35-112(1). In this case, the trial court found the following enhancement factors: (1) "[t]he

defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range,” Tenn. Code Ann. § 40-35-114(1); (2) “[t]he offense involved more than one . . . victim,” id. § 40-35-114(3); and (3) “[t]he personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great,” id. § 40-35-114(6).

The Defendant argues that the trial court erred by failing to apply any mitigating factors. See id. § 40-35-113. Specifically, the Defendant argues that the trial court should have considered under the “catchall” factor that the Defendant was attempting to reorganize his finances and that he was still trying to fulfill the obligations of each contract when he was fired. See id. § 40-35-113(13). In finding that the “catchall” factor did not apply, the trial court stated,

It is urged throughout the process that [the Defendant] was trying to restructure his finances, he was trying to borrow money, that he was trying to correct the problems by securing loans and had he been successful in doing that, that he could have avoided these problems, finished the homes and paid everyone off. That was based upon his testimony at trial and somewhat [upon his testimony at the sentencing hearing]. There’s no evidence before the Court, there was none at trial, that he ever actually did that. His testimony is that he had some financial backers named Zornes that were in the process of working out loans and arrangements to pay it off but the Zornes haven’t been here to testify and there’s been absolutely no documentation to support that.

The trial court’s finding that no mitigating factors should be applied in this case is adequately supported by the record, and thus, we may not disturb this finding on appeal.

The Defendant also argues that the trial court erred in imposing consecutive sentences. A court may order multiple sentences to run consecutively if it finds by a preponderance of the evidence that the Defendant fits into one of the categories established in the statute. Tenn. Code Ann. § 40-35-115(b). It is within the sound discretion of the trial court whether or not an offender should be sentenced consecutively or concurrently. State v. James, 688 S.W.2d 463, 465 (Tenn. Crim. App. 1984).

In this case, the trial court found that consecutive sentences were warranted because the Defendant “is a professional criminal who has knowingly devoted such defendant’s life to criminal acts as a major source of livelihood.” Tenn. Code Ann. § 40-35-115(b)(1). According to the trial court, the Defendant “has derived hundreds of thousands of dollars in income based upon criminal activity over the past few years.” The Defendant pled guilty in Delaware to two counts of misappropriation of funds and to two counts of theft over \$500.00. The trial court in Delaware ordered the Defendant to pay approximately \$168,000.00 in restitution. Following the events in Delaware that eventually led to the convictions, the Defendant moved to Tennessee and continued the same pattern of behavior. This case involves three separate convictions for misappropriation of contract funds. Because the evidence preponderates in favor of the trial court’s findings that the Defendant is a professional criminal, the trial court properly imposed consecutive sentences.

#### D. Restitution

Finally, the Defendant argues that the trial court imposed an excessive amount of restitution. Specifically, the Defendant argues that the trial court erred by calculating restitution based on the amount needed to complete each home. Instead, he argues that the trial court should have imposed restitution in the amount misapplied on each home.

A trial court, in conjunction with a sentence of total confinement, may order a defendant to make restitution to the victims of the offense. See id. § 40-35-104(c)(2). “The purpose of restitution is not only to compensate the victim but also to punish and rehabilitate the guilty.” State v. Johnson, 968 S.W.2d 883, 885 (Tenn. Crim. App. 1997). The standards set forth in Tennessee Code Annotated § 40-35-304, which governs restitution in conjunction with probation, are applicable to restitution issues in cases involving total confinement. Tenn. Code Ann. § 40-35-304(g). The statute indicates that the amount of restitution should be based on a victim’s pecuniary loss. See id. § 40-35-304(b). “Pecuniary loss” includes:

- (1) All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant; and
- (2) Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense; provided, that payment of special prosecutors shall not be considered an out-of-pocket expense.

Id. § 40-35-304(e). However, “the amount ordered to be paid does not have to equal or mirror the victim’s precise pecuniary loss.” State v. Smith, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994); State v. Frank Stewart, No. 01-C-01-9007-CC-00161, 1991 Tenn. Crim. App. LEXIS 68, at \*4 (Tenn. Crim. App., Nashville, Jan. 31, 1991). In determining the appropriate amount of restitution, a trial court must ascertain both the amount of the victim’s loss and the amount which the defendant can reasonably be expected to pay. Smith, 898 S.W.2d at 747.

In this case, the trial court ordered the Defendant to pay restitution in the amount of \$45,000.00 to Grimes. Grimes testified that he paid the Defendant a total of \$75,000.00. According to Grimes, the cost to complete the home was a little over \$40,000.00. The contract price for the Grimes’ home was \$85,699.00. The record indicates that Grimes paid the Defendant \$74,979.00, and spent \$42,600.00 to have the home completed. Thus, Grimes paid \$117,579.00 for a home that by contract with the Defendant should have cost \$85,699.00. The additional cost to Grimes by these calculations was \$31,880.00. In his victim impact statement, Mr. Grimes stated that he and his wife had spent \$20,000.00 “above contract” as of August, 1997, and that “\$20,000.00 plus” would have to be spent to complete the house. This statement supports the trial court’s restitution order of \$45,000.00 to Mr. and Mrs. Grimes.

The trial court ordered the Defendant to pay restitution in the amount of \$64,689.42 to Patterson. Patterson testified that he gave the Defendant \$99,040.00 to build his house and stated that it cost him an additional \$64,000.00 to finish his house after the Defendant was fired. The contract price for the Patterson home with add-ons was \$117,783.00. The record supports

Patterson's claim that he paid the Defendant \$99,040.00 and that he expended an additional \$64,000.00 to finish the home. Thus, Patterson paid \$163,040.00 for a home that by contract with the Defendant should have cost \$117,783.00. The additional cost to Patterson by these calculations was \$45,257.00. In his victim impact statement, Mr. Patterson stated that he and his wife had incurred expenses of \$64,689.42 to complete their home, and had also paid \$11,600.00 in interest "associated with the construction loan and a second loan to complete the home." This statement supports the trial court's restitution order of \$64,689.42 to Mr. and Mrs. Patterson.

The trial court ordered the Defendant to pay restitution in the amount of \$68,654.00 to Taylor. Taylor testified that he paid the Defendant a total of \$104,154.00 to build his home, and that he had to spend \$110,000.00 to finish the home after the Defendant was fired. The contract price for the Taylor home was \$122,955.00. Taylor spent \$224,154.00 for a home that by contract with the Defendant should have cost \$122,955.00. The additional cost to Taylor by these calculations was \$101,199.00. Thus, the evidence supports the trial court's decision to award Taylor \$68,654.00 in restitution.

The trial court awarded restitution in the amounts requested by the victims in their statements to the officer who prepared the Pre-Sentence Report. The amounts of restitution ordered by the trial court for Grimes and Patterson are more than the amounts calculated above. The amount of restitution ordered for Taylor is substantially less than the amount calculated above; however, Taylor specifically requested restitution in the amount that the trial court ordered. These amounts were never contested by the defense.

Although the Defendant does not argue that the amounts listed above are incorrect, he does contend that the trial court miscalculated the restitution allowed each victim. According to the Defendant, the trial court should have imposed restitution in the amount misapplied on each home rather than the amount needed to complete each home. However, the Defendant cites no authority for his contention that the victims must prove the amounts misapplied on their homes. See Tenn. R. App. P. 27(a)(7). The amounts calculated by the trial court adequately reflect the pecuniary losses to the victims. We conclude that the trial court committed no error in its determination of the amount of restitution owed to the victims in this case.

Accordingly, the judgments of the trial court are **AFFIRMED**.

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ROBERT W. WEDEMEYER, JUDGE